IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EZELL JACKSON Appellant.	No. 37105-7-II UNPUBLISHED OPINION

Armstrong, J. — Ezell Jackson appeals his conviction of violating a no-contact order, arguing that under the relevant statutes his violation did not involve an act or threat of violence or intrusion into a prohibited area and thus did not constitute a crime. Jackson also argues that the trial court imposed an unlawful indeterminate sentence, and he raises additional issues in a pro se statement of additional grounds (SAG).[1] We affirm.

Facts

On August 15, 2006, Tyson Sagiao, a law enforcement officer with the United States Department of Homeland Security, was patrolling near the Social Security Administration Office in Tacoma when he saw a van pull into the parking lot. Sagiao ran a check on the license plate, which showed Jackson as the registered owner of the van. Sagiao also learned Jackson was the respondent on a no-contact order naming Patricia Jackson as the protected party. Sagiao obtained a physical description of both parties.

He watched the driver park the van and go into the building with his female passenger. Because they matched the physical descriptions of Ezell and Patricia Jackson, Sagiao followed the

[1] RAP 10.10.

two inside where he found them sitting next to each other while filling out paperwork.

Moments later, they walked out together. When Sagiao approached and asked for their names and birth dates, the woman identified herself as Patricia Jackson, giving the same birth date as the protected party on the no-contact order. The driver confirmed that he was Ezell Jackson. Jackson acknowledged that he was not supposed to be with Patricia,[2] but he explained that they were not really together.

After confirming that the no-contact order was valid, Sagiao arrested Jackson. Jackson told Sagiao that Patricia had called him earlier asking for a ride to the social security office. He also told Sagiao that he had been convicted twice previously for violating the no-contact order.

The State charged Jackson with felony violation of a no-contact order under former RCW 26.50.110(1) (2006). At trial, Sagiao testified to the facts reported above, and the State introduced into evidence a copy of the no-contact order in effect on the date of the incident as well as certified copies of court records showing Jackson's two prior convictions for violating a no-contact order.

After the State rested, Jackson moved to dismiss, arguing that former RCW 26.50.110(1) criminalized only violations of a no-contact order for which an arrest is required under RCW 10.31.100(2)(a) and (b). Jackson argued that the statute did not criminalize his behavior. The trial court denied the motion, holding that "a reasonable jury can find, based on the evidence, that it was a no-contact order under existence and it's been violated on two occasions. And, more importantly, the Court is not inclined to read the statute the way that it's suggested by the defense. . . ." 3B Report of Proceedings at 27.

[2] We refer to Patricia Jackson by her first name for clarity.

The defense then called Patricia, who testified that she is Jackson's wife and that she was with him on August 15, 2006. She claimed, however, that she jumped into his van without invitation and would not leave even after Jackson told her to get out. When he entered the social security parking lot and again asked her to leave, she threatened to hurt herself and followed him into the building. Patricia testified that she waited until Jackson filled out some paperwork and then followed him out.

Jackson did not testify, and the jury found him guilty as charged. In a special verdict, the jury also found that Jackson had been convicted twice previously for violating the provisions of a no-contact order. These prior violations made Jackson's third violation a class C felony.

At sentencing, Jackson stipulated to his prior convictions. The court imposed a standard range sentence of 60 months, with 9 to 18 months of community custody, and added that the combined terms of confinement and community custody actually served could not exceed the statutory maximum of 60 months. Jackson appeals both his conviction and sentence.

ANALYSIS

I. Statutory Maximum Sentence

Jackson first argues that he received an unlawful sentence when the trial court imposed confinement of 60 months, plus 9 to 18 months of community custody, and noted on his judgment and sentence that "under no circumstances shall the combined term of confinement and term of community custody actually served exceed the statutory maximum." Clerk's Papers at 78. Jackson contends that because the trial court failed to make an initial determination of the sentence length and instead required the Department of Corrections (DOC) to ensure that the

statutory maximum is not violated, he received an unlawful indeterminate sentence that must be vacated.

A sentencing court "may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5); *State v. Sloan*, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Furthermore, a court must impose a determinate sentence that states exactly the months of total confinement and community supervision. Former RCW 9.94A.030(18) (2006); *see also In re Pers. Restraint of Quackenbush*, 142 Wn.2d 928, 935 n.3, 16 P.3d 638 (2001) (Sentencing Reform Act changed Washington's sentencing scheme from indeterminate to determinate sentences). The statutory maximum confinement for Jackson's class C felony is 60 months. RCW 9A.20.021(1)(c).

In *Sloan*, Division One reviewed the sentence for a class C felony in which the court imposed a 60-month sentence and 36 to 48 months of community custody. After considering the defendant's potential to earn early release time in prison, Division One found no violation of RCW 9.94A.505(5) and remanded for the sentencing court to clarify its sentence, reasoning:

> To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

Sloan, 121 Wn. App. at 223-24. We adopted the *Sloan* court's reasoning in *State v. Vant*, 145 Wn. App. 592, 605-07, 186 P.3d 1149 (2008).

The trial court included in Jackson's sentence the type of clarification approved of in *Sloan* and *Vant*, and the Washington Supreme Court recently held that such clarification does not result in an indeterminate sentence. *In re Pers. Restraint of Brooks*, __P.3d__, 2009 WL 2182745 (July 23, 2009). Following the petitioner's conviction of three counts of first degree attempted robbery, the trial court sentenced him to 120 months of total confinement and 18 to 36 months of community custody. *Brooks*, 2009 WL 2182745, at 1. Attempted robbery is a class B felony carrying a statutory maximum of 120 months' confinement. RCW 9A.20.020(1)(b). After the trial court amended the judgment and sentence to clarify that the combined total of confinement and community custody could not exceed the statutory maximum, the Supreme Court held that the amended sentence was not indeterminate because it had a defined range and determinate maximum within which the DOC could determine the appropriate amount of community custody.

> Under the current statutory scheme, the exact amount of time to be served can almost never be determined when the sentence is imposed by the court. The only thing that can be determined at the time of sentencing is the maximum amount of time an offender will serve in confinement and the maximum amount of time the offender may serve in totality. While the DOC was left the responsibility of ensuring Brooks did not serve more than 120 months of confinement and community custody, this responsibility stemmed from both the requirements of the SRA and the sentence that the court *imposed*. . . . It is the SRA itself that gave courts the power to impose sentences and the DOC the responsibility to set the amount of community custody to be served within that sentence.

Brooks, 2009 WL 2182745, at 5 (emphasis in original).

Consequently, Jackson's claim that he received an unlawful indeterminate sentence fails.

II. Interpretation of Former RCW 26.50.110(1)

Jackson next contends that his conviction should be reversed because the contact proved in this case did not constitute a crime under the version of RCW 26.50.110(1) in effect when he committed his offense. This provision stated as follows:

> Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10,. 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

Former RCW 26.50.110(1).

RCW 10.31.100(2)(a), in turn, mandates that the police must arrest any person suspected of violating a Washington domestic violence or no-contact order, but only if they have probable cause to believe that the restrained person has threatened or performed acts of violence, or has entered a prohibited area. RCW 10.31.100(2)(b) requires arrest under similar circumstances for foreign protection orders. Jackson argues, therefore, that for a violation of former RCW 26.50.110(1) to be a criminal offense, the violation must be one that mandates arrest under RCW 10.31.100(2)(a) or (b); i.e., one that involves an act or threat of violence or entering a prohibited area.

We disagree for the reasons stated in *State v. Wofford*, 148 Wn. App. 870, 201 P.3d 389 (2009), and *State v. Allen*, 150 Wn. App. 300, 207 P.3d 483 (2009).[3] The legislative history of

[3] We acknowledge that other panels of this court interpreted the former statute differently in *State v. Hogan*, 145 Wn. App. 210, 192 P.3d 915 (2008), and *State v. Madrid*, 145 Wn. App. 106, 192

former RCW 26.50.110(1), including its amendment in 2007, clarifies that a gross misdemeanor results when the restrained person knows of the order and violates a provision prohibiting acts or threats of violence against, or stalking of, a protected party, or a restraint provision prohibiting contact with a protected party. *Wofford*, 148 Wn. App. at 881. As further explained in *Wofford*, principles of statutory construction show that conduct for which an arrest is required is not necessary to sustain a conviction under former RCW 26.50.110(1). *Wofford*, 148 Wn. App. at 881. Consequently, Jackson's interpretation of former RCW 26.50.110(1) is incorrect, and he was properly convicted of violating a no-contact order.

III. SAG Issues

Jackson raises five issues in his pro se SAG. He argues first that insufficient evidence supported the jury's special verdict that elevated his offense to a class C felony. More specifically, he argues that the State failed to prove that his two prior convictions for violating a no-contact order were issued under one of the statutes specified in former RCW 26.50.110(5), which provides:

> A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two prior convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

We consider evidence in a criminal case sufficient if, after viewing the evidence in the light most favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

P.3d 909 (2008).

The trial court admitted several exhibits pertaining to Jackson's prior convictions. Exhibit 1 was a copy of a no-contact order issued under cause number 04-1-04427-0, which referred to chapters 10.99 and 26.50 RCW in ordering Jackson to refrain from contacting Patricia. Exhibits 2 and 3 showed that Pierce County charged Jackson in 2006 with violating the no-contact order issued in cause number 04-1-04427-0 and that he pleaded guilty to that violation. Exhibit 4 was a criminal complaint filed by the Tacoma Municipal Court in 2005 that also charged Jackson with violating the no-contact order issued under cause number 04-1-04427-0, and Exhibit 5 showed that Jackson was convicted of that violation.

By referring to the cause number under which the no-contact order was issued, Exhibits 2-5 constituted circumstantial evidence that Jackson's two prior convictions involved an order issued under chapters 10.99 and 26.50 RCW, two of the specified statutes referenced in RCW 26.50.110(5). Viewing the evidence in the light most favorable to the State, the jury had sufficient evidence to find that Jackson had two qualifying predicate convictions.[4]

Jackson also argues that his due process rights were violated because he was not in the courtroom when the trial court granted four short continuances on its own motion. These continuances were necessary because no courtroom was available and, in one instance, because Jackson's attorney had a scheduling conflict.

A criminal defendant has the right to be present at a proceeding when his presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *U.S. v.*

[4] We also note that the trial court admitted Jackson's statement that he had violated the no-contact order twice previously.

Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). A defendant does not have the right to be present during in-chambers or bench conferences between court and counsel on legal matters. *Benn*, 134 Wn.2d at 920. Consequently, a defendant does not have the right to be present during a hearing on a motion for a continuance. *Benn*, 134 Wn.2d at 920.

Jackson's next two issues concern alleged prosecutorial misconduct and how the trial court handled it. During his trial, Jackson had another no-contact order prosecution pending under a different cause number. While cross examining Patricia, the State asked whether she had talked to a second officer about Jackson and whether she had told that officer she was afraid to testify against Jackson. The defense objected to this line of questioning. In the jury's absence, the State explained that the conversation at issue was related to Jackson's other pending prosecution but that it was relevant to the current offense as well. The trial court sustained the objection and instructed the jury to disregard the question and response indicating what Patricia told the second officer.

The State then asked Patricia whether she had followed "these cases" after her conversation with the officer. She replied that she knew Jackson had been charged with a crime. After she finished testifying, defense counsel asked for a moment with his client. During the following recess, the court instructed counsel to refrain from any reference to "cases" because

there was only one case going on and any reference to cases could suggest other criminal proceedings against Jackson. The defense rested and the parties considered the jury instructions.

When Jackson's trial resumed the next day, defense counsel asked for a mistrial based on the State's questioning of Patricia about her statements to the second officer that stemmed from Jackson's other case. The court denied the motion, noting that it presumed the jury would follow the curative instruction.

Jackson now contends that prosecutorial misconduct deprived him of a fair trial and that the trial court erred in denying his motion for a mistrial. He complains of the State's questioning of Patricia about her statements to the second officer and to the State's subsequent reference to the "cases" against Jackson.

Prosecutorial misconduct generally requires a new trial when there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). In determining whether a trial irregularity influenced the jury, a court may look at the seriousness of the irregularity, whether the statement in question was cumulative of other evidence properly admitted, and whether the irregularity could be cured by an instruction to disregard the remark. *In re Det. of Smith*, 130 Wn. App. 104, 113, 122 P.3d 736 (2005).

The questioning regarding Patricia's statements to the other officer did not clearly refer to a second criminal proceeding, and the trial court instructed the jury to disregard both the question and answer. Whatever irregularity occurred in this context was cured by the court's instruction.

See Smith, 130 Wn. App. at 113 (jury presumed to follow curative instruction). The subsequent reference to "cases" was improper but insignificant in light of the overwhelming evidence of guilt presented. We do not see a substantial likelihood that this statement affected the jury's verdict.

Nor do we find that the trial court abused its discretion in declining to declare a mistrial. *See State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (trial court's denial of mistrial reviewed for abuse of discretion). Trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The trial judge is best situated to assess the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Having concluded that the trial court's instruction cured any prejudice resulting from the State's initial questioning and that the State's subsequent reference to "cases" was insignificant in the context of the evidence presented, we conclude that the trial court did not abuse its discretion in denying Jackson's motion for a mistrial.

Finally, Jackson asserts that the trial court's "to convict" instruction was inadequate because it failed to reference RCW 10.31.100(2)(a). We reject this claim of error based on our analysis of former RCW 26.50.110(1). We also note that the "to convict" instruction Jackson proposed did not refer to RCW 10.31.100(2)(a). *See State v. Jacobson*, 74 Wn. App. 715, 724, 876 P.2d 916 (1994) (defendant's proposal of instruction containing same alleged error constitutes waiver of alleged error).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.